Arbitrator's findings were upheld in Federal Court (Findings, Pars. 42-54). It has been the ruling here that the facts as determined in the arbitration proceeding are not to be re-litigated, and the conduct will be considered in the context of renewal expectancy. (Tr. 143).

14. As detailed in the cited Findings, there occurred at WBZZ over a twenty-three month period a continuing pattern of sexual harassment and discrimination against a female employee, newscaster Liz Randolph. During the period February, 1986 to January 22, 1988, the two WBZZ morning drive-time personalities, Jim Quinn and Don Jefferson, subjected Ms. Randolph, to a continuing assault of on-air comments that she was a promiscuous person, that she was mentally unstable and had sexually transmitted diseases, that she was having sex with members of a hockey team and servicemen, and that she knew the hotline numbers for the Center for Disease Control by heart. These comments were broadcast over WBZZ at times when Ms. Randolph was on vacation and at times when she appeared on the program as required by her job. Ms. Randolph had told WBZZ management and the two announcers that she was upset and angered over these lewd and derogatory statements, but without result. The culmination occurred on January 22, 1988, when there was a broadcast over WBZZ a "joke" which named Ms. Randolph and referred to her performance of oral sex. Ms. Randolph was so upset that she

left the station without performing two remaining news casts scheduled that morning, and she was shortly thereafter terminated by EZ for "flagrant neglect of duty". EZ then denied her request for severance pay and Ms. Randolph filed the grievance which led to the arbitration hearing and decision. (Findings, Pars. 18-24).

15. In holding for Ms. Randolph, it was found that:

> "The jokes and suggestive remarks that were directed to her were lewd, offensive, sophomoric, in bad taste and beyond anything that an employee should have to be subjected to--even if they are part of an 'entertainment vehicle'. Fortunately or unfortunately (depending on one's perspective) the First Amendment protects such forms of expression from censorship. Constitutional protections, however, do not mean that an individual of reasonable sensibilities must be unwillingly bombarded or subjected to such forms of free speech, at least not as a mandated job requirement or within the confines of one's work environment. I find a parallel exists in this situation with circumstances that precipitated and are now governed by the Federal Government's Sexual Harassment Laws. An employee no longer has to put up with a hostile work environment that is created on the basis of sex, be it in the form of jokes, comments, suggestions, touching, etc." (Findings, Par. 36).

It was also found that the conduct at WBZZ was so extreme as to justify Ms. Randolph in the serious action of leaving the station prior to her scheduled newscasts, such determination set forth as follows:

> "There is no question, under these circumstances, that the grievant's action of walking off the job was not only understandable, but more importantly, was justifiable. The conduct on the part of the disc jockeys was degrading, humiliating, and a serious invasion of her personal rights and dignity. I would find it unreasonable to require the grievant to have remained on the job after being subjected to such vile and lewd insults and be expected merely to file a grievance. These circumstances are a narrow exception to the self-help rule and justify the grievant's actions." (Findings, Par. 38)

16. There is no question that the Commission considers employee discrimination to be a serious form of misconduct. The Commission has a broad Equal Employment Opportunity (EEO) policy under which:

> broadcast stations are prohibited from discriminating on the basis of race, color, religion, national origin, or sex and are required to carry out a continuing program designed to foster equal opportunity in all aspects of their employment policy and practice. (emphasis added)

Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Rules, 2 FCC Rcd 3967, 63 RR 2d 220, 222-223 (1987). The misconduct of EZ described in the Arbitrator's opinion falls well within the scope of conduct prohibited by that policy. The Commission has recognized that sexual harassment is a form of discrimination. In Atlantic City Community Broadcasting, Inc., 8 FCC Rcd 4520 (1993), affirming

in pertinent part 6 FCC Rcd 925, 68 RR 2d 1419 (Rev. Bd. 1991), the Commission recognized that a lawsuit that resulted in a finding of sexual harassment was a "discrimination suit". The Arbitrator's ruling makes clear that what he found was an egregious case of sexual harassment.

17. In implementing its EEO policy against discriminatory conduct, the Commission has adopted a specific Rule, Section 73.2080(b)(4) mandating that licensees shall:

> "Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon race, color, religion, national origin or sex from its personnel policies and practices and working conditions."

There is no question that the sexual harassment and discrimination occurred as an integral part of EZ's practices and working conditions. Ms. Randolph was required to subject herself over a twenty-three month period to a hostile and abusive work environment, which was particularly egregious since the lewd and derogatory comments were broadcast over the air. EZ obviously believed that such "jokes" enhanced the popularity of its morning-drive program, to EZ's economic benefit. There is thus presented not only a pattern of sexual harassment, but sexual harassment presented over the air as amusement and for profit.

18. The seriousness with which the Commission and the courts regard discrimination is evidenced by the precedent.

As the United States Court of Appeals For The District of Columbia Circuit, the supervising Court for Commission licensing, has stated:

> "The FCC's concerns, however, cannot be wholly prospective: in implementing its anti-discrimination policy, the Commission of necessity must investigate broadcasters' past employment practices. A documented pattern of intentional discrimination would put seriously into question a licensee's character qualifications to remain a licensee: intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship." Bilingual Bicultural Coalition on Mass Media v. FCC, 595 F. 2d 621, 628, 42 RR 2d 1523, 1535, (D.C. Cir. 1978)(en banc).

Here, there is a document pattern of sexual discrimination and harassment extending over a twenty-three month period, and only terminated when the abuse and its cumulative effect forced Ms. Randolph from her job. This is licensee misconduct squarely within the principles articulated by the Court in the just-cited case.

19. It is also noteworthy that the Commission has in fact found a renewal applicant basically disqualified because, inter alia, of a single instance where a job applicant was rejected because of her race, see Catoctin Broadcasting Corp. of New York, 4 FCC Rcd 2553, 66 RR 2d 131 (1989). The sexual discrimination and harassment at issue here covered not a single occasion, but extended over a lengthy period as an integral and intentional part of WBZZ programming. During

this period, EZ took no action to eliminate the harassment and when the employee left, EZ displayed a callous attitude by denying severance pay and forcing the employee to file a grievance, wherein EZ attempted to excuse the harassment as "jokes" or "entertainment". EZ's subterfuge defense, reflecting prejudice just as blatant as that in Catoctin Broadcasting, supra, exacerbates the misconduct.

20. It should also be emphasized that the prohibition against sexual harassment in the workplace is a Congressional policy, as delineated by statute and affirmed by the Supreme Court. Federal policy and law in the area of sexual harassment was recently the subject of a unanimous high court ruling in Harris v. Forklift Systems, Inc., U.S. Sup. Ct. Case No. 92-1168, decided November 9, 1993.[6] The Court (Slip Opinion, Pp. 3-4) set forth the law as follows:

> "Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e-2(a)(1). As we made clear in *Meritor Savings Bank v. Vinson,* 477 U. S. 57 (1986), this language "is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," which includes requiring people to work in a

[6] A copy of the Court's opinion is Attachment A hereto.

> discriminatorily hostile or abusive environment. *Id.*, at 64, quoting *Los Angeles Dept. of Water and Power v. Manhart,* 435 U. S. 702, 707, n. 13 (1978) (some internal quotation marks omitted). When the workplace is permeated with "discriminatory intimidation, ridicule and insult," 477 U. S., at 65, that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," *id.*, at 67 (internal brackets and quotation marks omitted), Title VII is violated."

The Court then ruled that it was not necessary for an employee to prove psychological harm to establish a violation of law. Here it has been adjudicated that a WBZZ employee was subjected to an abusive work environment, and thus there was a violation of Federal law as well as Commission law and policy.

D. Renewal Expectancy--WBZZ Programming

21. In evaluating past programming under the renewal expectancy, the focus is on non-entertainment programming. It was EZ policy to broadcast six percent (6%) non-entertainment programming per week over WBZZ. (Findings, Par. 60). It will be recalled that when the radio broadcast renewal forms called for program percentages, it was the Commission policy that 6% non-entertainment programming for commercial FM stations was a minimum standard which would allow a station's renewal application to be routinely processed by the staff, see Delegation of Authority, 43 FCC 2d 638, 640 (1973) and 59 FCC

2d 491, 493 (1976). EZ has continued this minimum standard policy at WBZZ.

22. The more recent analyses in comparative renewal cases have addressed the quantity of non-entertainment programming, but also whether it is locally-produced and the scheduling of such programming in determining where a past broadcast record fits, if at all, on the renewal expectancy scale. The Commission has held that while no one of these criteria is dispositive, all are relevant criteria in evaluating a claim to renewal expectancy. See particularly Video 44, 6 FCC Rcd 4948, 69 RR 2d 975 (1991) where the Commission stated:

> "Nonetheless, the amount of non-entertainment programming and local programming presented, and its timing, are relevant factors. Deficiencies in these areas, if not offset, reflect adversely on a station's responsiveness to the community." 6 FCC Rcd 4949, 69 RR 2d 977.

In Video 44, the Commission, pursuant to a court remand, focused on the last year of the term of the renewal applicant, finding the pertinent percentages as follows:

> "During the last year of the term, however, WSNS-TV presented 0.08 percent news, 2.57 percent public affairs, 5.84 percent other non-entertainment programming and 0.89 percent local programming." Video 44, 5 FCC Rcd 6383, 68 RR 2d 503, 504.

Moreover, these programs were broadcast during a time period of 6:00 a.m. to 7:00 a.m. on weekly mornings.

23. In Video 44, the Commission found that the licensee was entitled to no renewal expectancy preference of any weight at all. Applying the Commission's criteria to WBZZ's record yields the following comparison:

(a) Quantity of Non-entertainment Programming

In Video 44, the total of such programming during the decisional period totaled 6.04 percent (.08% news, 2.57% public affairs and 5.84% other programming) with 0.89% local programming. Here, EZ's policy was to broadcast 6% non-entertainment programming per week, which on a 168 hour week would be approximately ten hours per week. EZ barely reached that level, even if full credit is given for the man-in-street Pittsburgh Opinion concerning which there was ambiguity as to the extent of their broadcast and whether such brief one-minute segments are in fact programming or more in the nature of announcements not customarily considered programming. However, even if WBZZ were credited with generally approximately its 6% goal, that quantity of non-entertainment programming is the same quantity that was found insubstantial and deficient in Video 44, supra.

(b) Scheduling of Non-entertainment Programming

In Video 44, the scheduling of non-entertainment programming between 6:00 a.m. and 7:00 a.m. on weekly mornings was found to be a relevant deficiency. Here, all of WBZZ's non-entertainment programming (other than news and Pittsburgh Opinion) was broadcast on Sunday mornings between 4:00 a.m. and 8:00 a.m. Such WBZZ scheduling, three-fourths of which is earlier that the scheduling in Video 44 and on the Sunday rather than weekdays, is fully as deficient as Video 44. With respect to news there was some fifteen minutes a day during the time of 5:57 a.m. to 8:57 a.m. on weekdays, totaling one hour and fifteen minutes per week. After 9 a.m. on weekday mornings (and WBZZ broadcast no news weekend mornings) there was no news on WBZZ until 12:57 a.m. when a pre-recorded newscast was played, and then repeated during the succeeding overnight hours. Thus, during weekdays there would be almost sixteen hour periods (9:00 a.m. - 12:57 a.m.) when there was no regularly scheduled news on WBZZ. Thus, in the context of scheduling WBZZ with its non-entertainment programming on early Sunday mornings and its large

void of news programming is essentially as unimpressive as that found deficient in Video 44.

(c) Extent of Local Programming

The only local program of WBZZ was Dialogue, one hour per week, comprising only some 0.06% of the composite week. Again, this is not appreciably different than the 0.89 percent local programming which was found unpersuasive and deficient in Video 44.

24. It is thus apparent that WBZZ's performance was not appreciably different than that in Video 44. EZ aspired only to the minimum standard of 6% which together with its early Sunday morning schedule and news void through most of the waking day evidenced a philosophy of doing the minimum of non-entertainment programming, very little of it local, and scheduled at generally undesirable times. Such a record is entitled to none or at most the slightest renewal expectancy weight. When the egregious pattern of sexual discrimination and sexual harassment is factored in, the ultimate conclusion is that EZ is not entitled to a renewal expectancy.

IV. Proposed Ultimate Conclusion and Decision

Allegheny has a very substantial preference under the important diversification criterion. EZ is not entitled to a renewal expectancy and has no other claims for comparative

preferences. Accordingly, the application of Allegheny should be granted.[7]

Respectfully submitted,

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[7] In the event integration is to be considered in light of the recent court ruling in Susan M. Bechtel v. FCC (Case No. 92-1378), decided December 17, 1993, in U.S. Ct. App. D.C. Cir., Allegheny would have a slight additional comparative preference.

CERTIFICATE OF SERVICE

I, Dana V. Chisholm, do hereby certify that on the 14th day of January 1994, a copy of the foregoing "Proposed Findings of Fact and Conclusions of Law of Allegheny Communications Group, Inc." was sent first-class mail, postage prepaid to the following:

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